such person from the visa by listing the name of each excluded crew member below the visa stamp. An excluded crew member's name may not be stricken from the crew list.

(2) *Refusal of crew-list visa.* A crew-list visa shall be refused if all aliens listed thereon are found by the consular officer not to be bona fide crewmen or otherwise ineligible to receive individual visas as crew members. In any case where a crew-list visa is refused, a full report shall be forwarded to reach the Department before the arrival of the vessel or aircraft at the first port of entry. In any case of refusal the original crew list shall be returned to the master, aircraft captain, or authorized agent, and the duplicate shall be filed in the consular office.

[52 FR 42597, Nov. 5, 1987, as amended at 56 FR 30428, July 2, 1991; 61 FR 1836, Jan. 24, 1996]

EFFECTIVE DATE NOTE: At 69 FR 12799, Mar. 18, 2004, § 41.42 was removed and reserved, effective June 16, 2004.

Subpart F—Business and Media Visas

§ 41.51 Treaty trader or treaty investor.

(a) *Treaty trader.* An alien is classifiable as a nonimmigrant treaty trader (E–1) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(i) and that the alien:

(1) Will be in the United States solely to carry on trade of a substantial nature, which is international in scope, either on the alien's behalf or as an employee of a foreign person or organization engaged in trade, principally between the United States and the foreign state of which the alien is a national, (consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade); and

(2) Intends to depart from the United States upon the termination of E–1 status.

(b) *Treaty investor.* An alien is classifiable as a nonimmigrant treaty investor (E–2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(ii) and that the alien:

(1) Has invested or is actively in the process of investing a substantial amount of capital in *bona fide* enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; and

(2) Is seeking entry solely to develop and direct the enterprise; and

(3) Intends to depart from the United States upon the termination of E–2 status.

(c) *Employee of treaty trader or treaty investor.* An alien employee of a treaty trader may be classified E–1 and an alien employee of a treaty investor may be classified E–2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. The employer must be:

(1) A person having the nationality of the treaty country, who is maintaining the status of treaty trader or treaty investor if in the United States or if not in the United States would be classifiable as a treaty trader or treaty investor; or

(2) An organization at least 50% owned by persons having the nationality of the treaty country who are maintaining nonimmigrant treaty trader or treaty investor status if residing in the United States or if not residing in the United States who would be classifiable as treaty traders or treaty investors.

(d) *Spouse and children of treaty trader or treaty investor.* The spouse and children of a treaty trader or treaty investor accompanying or following to join the principal alien are entitled to the same classification as the principal alien. The nationality of a spouse or child of a treaty trader or treaty investor is not material to the classification of the spouse or child under the provisions of INA 101(a)(15)(E).

(e) *Representative of foreign information media.* Representatives of foreign information media shall first be considered for possible classification as nonimmigrants under the provisions of

INA 101(a)(15)(I), before consideration is given to their possible classification as nonimmigrants under the provisions of INA 101(a)(15)(E) and of this section.

(f) *Treaty country.* A treaty country is for purposes of this section a foreign state with which a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under INA 101(a)(15)(E) by specific legislation (other than the INA).

(g) *Nationality of the treaty country.* The nationality of an individual treaty trader or treaty investor is determined by the authorities of the foreign state of which the alien claims nationality. In the case of an organization, ownership must be traced as best as is practicable to the individuals who ultimately own the organization.

(h) *Trade.* The term ''trade'' as used in this section means the existing international exchange of items of trade for consideration between the United States and the treaty country. Existing trade includes successfully negotiated contracts binding upon the parties which call for the immediate exchange of items of trade. This exchange must be traceable and identifiable. Title to the trade item must pass from one treaty party to the other.

(i) *Item of trade.* Items which qualify for trade within these provisions include but are not limited to goods, services, technology, monies, international banking, insurance, transportation, tourism, communications, and some news gathering activities.

(j) *Substantial trade.* Substantial trade for the purposes of this section entails the quantum of trade sufficient to ensure a continuous flow of trade items between the United States and the treaty country. This continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of the monetary value. Although the monetary value of the trade item being exchanged is a relevant consideration, greater weight is given to more numerous exchanges of larger value. In the case of smaller businesses, an income derived from the value of numerous transactions which is sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade.

(k) *Principal trade.* Trade shall be considered to be principal trade between the United States and the treaty country when over 50% of the volume of international trade of the treaty trader is conducted between the United States and the treaty country of the treaty trader's nationality.

(l) *Investment.* Investment means the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment given to the particular circumstances of each case. The alien may use any legal mechanism available, such as by placing invested funds in escrow pending visa issuance, that would not only irrevocably commit funds to the enterprise but that might also extend some personal liability protection to the treaty investor.

(m) *Bona fide enterprise.* The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity for profit and must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.

(n) *Substantial amount of capital.* A substantial amount of capital constitutes that amount that is:

(1)(i) Substantial in the proportional sense, i.e., in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;

(ii) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

(iii) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

(2) Whether an amount of capital is substantial in the proportionality sense is understood in terms of an inverted sliding scale; i.e., the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.

(o) *Marginal enterprise.* A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. An enterprise that does not have the capacity to generate such income but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise. The projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.

(p) *Solely to develop and direct.* The business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by other means.

(q) *Executive or supervisory character.* The executive or supervisory element of the employee's position must be a principal and primary function of the position and not an incidental or collateral function. Executive and/or supervisory duties grant the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof.

(1) An executive position provides the employee great authority to determine policy of and direction for the enterprise.

(2) A position primarily of supervisory character grants the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.

(r) *Special qualifications.* Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise.

(1) The essential nature of the alien's skills to the employing firm is determined by assessing the degree of proven expertise of the alien in the area of operations involved, the uniqueness of the specific skill or aptitude, the length of experience and/or training with the firm, the period of training or other experience necessary to perform effectively the projected duties, and the salary the special qualifications can command. The question of special skills and qualifications must be determined by assessing the circumstances on a case-by-case basis.

(2) Whether the special qualifications are essential will be assessed in light of all circumstances at the time of each visa application on a case-by-case basis. A skill that is unique at one point may become commonplace at a later date. Skills required to start up an enterprise may no longer be essential after initial operations are complete and are running smoothly. Some skills are essential only in the short-term for the training of locally-hired employees. Long-term essentiality might, however, be established in connection with continuous activities in such areas as product improvement, quality control, or the provision of a service not generally available in the United States.

(s) *Labor disputes.* Citizens of Canada or Mexico shall not be entitled to classification under this section if the Attorney General and the Secretary of Labor have certified that:

(1) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and

(2) The alien has failed to establish that the aliens entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

[62 FR 48154, Sept. 12, 1997]